

**UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W., SUITE 400
WASHINGTON, DC 20001**

Date: September 17, 1997

Case No.: 96-INA-82

In the Matter of:

TRAVEL MARKETING SERVICES,
Employer,

On Behalf of:

MANABU TERAHIGASHI,
Alien.

Appearance: Jerry C. Chang, Esq.,
For the Employer/Alien

Before: Burke, Guill and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM

The above entitled action arises upon an Employer's request for review pursuant to 20 C.F.R. § 656.26 of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. Employer filed an application seeking alien labor certification for the position of Assistant Manager, Travel Agency. Employer listed a two year experience requirement in either the position offered or the related occupation of "Exp. In marketing/sales activities for travel agency serving Japanese speaking tourists." (Appeal File ¹ 29).

On June 7, 1995, the CO issued a Notice of Findings ("NOF") proposing to deny certification. Labeling the position that of Travel Agent rather than an Assistant Manager, Travel Agency, the CO reasoned that the two year experience requirement exceeded the SVP of "over six months up to and including one year." The CO instructed Employer either to document the

¹ All further reference to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number. Unless otherwise noted, all regulations cited in this decision are in 20 C.F.R. § 656.

business necessity of the two year experience requirement or reduce the experience requirement to the DOT specifications, amend Employer's application, and re-advertise. The CO indicated that business necessity could be established by:

[s]ubmitting evidence that your requirement arises from a business necessity. To establish business necessity, an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform in a reasonable manner the job duties as described by the employer. Rebuttal evidence must include documentation as to why someone meeting the DOT standard could not perform the duties listed.

(AF 16).

Employer filed a rebuttal on June 16, 1995. Employer argued that the two year experience requirement was based on business necessity and that the position should be reclassified to that of "Travel Agency Assistant Manager, Marketing and Sales." According to Employer, business necessity was established because the position offered . . . involves the performance of duties beyond those normally associated with the position of travel agent as defined by the DOT." (AF 11). As to the reclassification, Employer argued that if the position were that of an assistant manager, the two year requirement would not be unduly restrictive.

The CO issued a Final Determination ("FD") denying certification on July 3, 1995. The CO reasoned that the position in question was that of a Travel Agent and not an Assistant Manager, Travel Agency, because "[a]s can be readily seen, the job duties are fully encompassed in the DOT description of a travel agent." (AF 9, 10). Additionally, the CO noted that, where an assistant manager has supervisory functions, the position offered required no supervision of employees. Lastly, the CO stated that Employer failed to provide "documented evidence" supporting business necessity.

On July 19, 1995, Employer filed motion for reconsideration and a request for review in the alternative. The CO denied Employer's motion for reconsideration.

Discussion

If an unclear or ambiguous NOF causes or contributes to an employer's confusion, the matter may be remanded to the CO for clarification and to give the employer an opportunity to rebut. *See, e.g., Sage Brown & Assoc.*, 91-INA-318 (Dec. 7, 1992); *Patisserie Suisse, Inc.*, 90-INA-131 (Oct. 16, 1991). The NOF must specify what the employer must show to rebut or cure the CO's findings. *Copely Place Travel Bureau*, 95-INA-65 (Nov. 5, 1996).

In the instant case, the CO's NOF directed Employer to either establish the business

necessity of the two year experience requirement or lower the requirement to comply with the SVP listed in the DOT for the position of Travel Agent. (AF 16). If Employer chose the latter, the CO further directed, it should delete the requirement and re-advertise the position. *Id.* However, the CFO should have allowed Employer a third choice of challenging the CO's finding that the position was that of a Travel Agent rather than an Assistant Manager, Travel Agency. Employer should have been given this option because, had the position been that of an Assistant Manager, Travel Agency, it would never have had to demonstrate the business necessity of its two year experience requirement. See **Manuel Reyes**, 89-INA-022 (Nov. 28, 1989). Failure to give Employer this third option generated confusion for Employer. Employer combined its argument that the position was not that of a Travel Agent with its argument that business necessity compelled the two year experience requirement.

Additionally, the CO failed to consider Employer's evidence and argument concerning the business necessity of the two year requirement. Failure of the CO to consider such evidence or argument may result in remand. See **Rousseau Enterprises, Inc.**, 94-INA-501 (Feb. 14, 1996); **Scientific Research Assoc.**, 89-INA-032 (Feb. 9, 1990). Reasonably specific written assertions are documentation that must be considered in the alien labor certification process. **Metro Homes Services, Inc.**, 95-INA-168 (Dec. 27, 1996); **Gencorp, Inc.**, 87-INA-659 (Jan. 13, 1988) (*en banc*).

In the NOF the CO proposed to deny certification partly on the basis that Employer failed to provide "documented evidence" supporting the business necessity of the two year experience requirement. However, the record contains an argument from Employer's counsel and a letter submitted by Employer's owner that indicate otherwise. Employer's counsel argued that business necessity was established because "the position offered . . . involves the performance of duties beyond those normally associated with the position of travel agent as defined by the DOT." (AF 11). Employer's owner's letter to the CO provided several arguments why a two year experience requirement was necessary for the position offered. He argued that Alien's duties will include "researching travel trends;" he indicated that Alien will gather data on competitors in the Japanese market; he indicated that "experience handling customer relations with Japanese clients is a must;" and he argued that the "qualifications of the individual in order to perform this job must include experience with marketing and sales strategies within the travel industry." Employer also provided explanations for each of these arguments. Both Employer's counsel and Employer's own arguments are reasonably specific assertions within the meaning of **Gencorp, Inc.** Accordingly, the CO was obligated to review them to decide whether they established business necessity.

Order

For the foregoing reasons, the CO's Final Determination denying certification is hereby REVERSED and the case is REMANDED with instructions to allow Employer to rebut the CO's proposal finding that the position is that of Travel Agent, rather than an Assistant Manger, Travel Agency. We decline to comment on the strength of Employer's case.

SO ORDERED.

Entered at the direction of the panel by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.